

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 05-N-15321-RAH
)	
CHERYL ANN PODBIELSKI,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 134570,)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) alleging that respondent CHERYL ANN PODBIELSKI failed to comply with rule 955 of the California Rules of Court¹ as ordered by the Supreme Court. The State Bar was represented by Christine Souhrada. Respondent did not participate either in person or by counsel.

For the reasons stated below, it is recommended that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed and properly served on respondent on December 28, 2007, by certified mail, return receipt requested, at the address shown on the official membership records of the State Bar (official address). (Bus. & Prof. Code §6002.1, subd. (c)²; Rules Proc. of State Bar, rules 60(b) and 583.) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt was returned to the State Bar. Courtesy copies were also sent by regular mail to three alternate

¹Future references to rule are to this source. Rule 955 was renumbered as rule 9.20 effective January 1, 2007.

²All references to section are to this source.

addresses for respondent.

On January 9, 2007, the State Bar Court properly served respondent by first-class mail, postage prepaid at her official address with a notice scheduling a status conference on March 6, 2007.

Respondent did not file a response to the NDC. On January 24, 2007, the State Bar filed and properly served on respondent a motion for entry of default by certified mail, return receipt requested, at her official address and, by regular mail, at three alternate addresses. (Rules Proc. of State Bar, rule 200(a), (b).) The motion advised respondent that the State Bar would seek her disbarment if she was found culpable. (Rules Proc. of State Bar, rule 200(a)(3).)

Respondent did not respond to the default motion. Orders entering respondent's default and involuntarily enrolling her inactive were filed and properly served on her on February 15, 2007, by certified mail, return receipt requested at her official address. This document advised respondent, among other things, that she was enrolled inactive pursuant to section 6007, subdivision (e) effective three days after service of the order.

The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which indicate that none of its correspondence sent to respondent was returned as undeliverable.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <<http://www.supremecourtus.gov/opinions/05slipopinion.html>>.)

The case was submitted for decision on February 16, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based upon matters admitted into evidence or judicially noticed.

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 14, 1988, and has been a member of the State Bar at all times since.

B. Facts

On April 18, 2006, the California Supreme Court filed an order, number S140712 (April 18, 2006 order), in State Bar Court case no. 04-O-14467 in which respondent was ordered, among other things, to be actually suspended for 30 days and until she complied with rule 205. If she was actually suspended for 90 days or more, he was also ordered to comply with rule 955(a) and (c) within 120 and 130 days, respectively, of the effective date of its order. The order was effective on May 18, 2006. (Rule 953(a).³)

Respondent was actually suspended for more than 90 days. Accordingly, respondent was to comply with rule 955(c) no later than September 25, 2006.

The Supreme Court promptly sent respondent a copy of its order⁴ and she received it. A copy of it also was attached to the NDC in the instant proceeding.

As of December 27, 2007, respondent had not filed with the State Bar Court the affidavit required by rule 955(c). She still has not done so.⁵ She has offered no explanation for her noncompliance with rule 955(c).

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³This rule was renumbered as rule 9.18 effective January 1, 2007.

⁴Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court (formerly numbered as rule 29.4(a)) requires the Clerk to promptly transmit a copy of all opinions and orders to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent promptly after its filing.

⁵Pursuant to Evidence Code section 452, subdivision (d), the court judicially notices that its records still do not contain a rule 955(c) affidavit from respondent.

C. Legal Conclusions

There is clear and convincing evidence that respondent wilfully violated the April 18, 2006, order directing her compliance with rule 955.⁶ This constitutes a violation of rule 955(d), which makes the wilful noncompliance with the provisions of rule 955 a cause for disbarment, suspension or revocation of probation, in relevant part.

IV. FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct⁷, std. 1.2(b).)

Respondent's prior discipline record is an aggravating circumstance. (Std. 1.2(b)(i).) As previously discussed, in S140712, the Supreme Court imposed discipline consisting of one year's stayed suspension and actual suspension for 30 days and until she complied with rule 205, among other things. In that matter, respondent was found culpable, in one client matter, of violating rules 3-700(A)(2) and 3-700(D)(1) as well as section 6068, subdivisions (i) and (m). Her clean disciplinary record for 15 years was a mitigating factor. In aggravation, the court found multiple acts of misconduct, client harm and not participating in the disciplinary proceedings prior to the entry of default.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of her misconduct by not complying with rule 955(c) even after the NDC in the instant proceeding was filed. (Std.1.2(b)(v).)

V. FINDINGS AND CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES

Respondent did not participate in these proceedings or present any mitigating circumstances pursuant to standard 1.2(e). Since respondent bears the burden of establishing

⁶Wilfulness in the context of rule 955 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep his official address current prevented him from learning that he had been ordered to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

⁷Future references to standard or std. are to this source.

mitigation by clear and convincing evidence, the court has no basis for finding mitigating factors.

VI. LEVEL OF DISCIPLINE

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's wilful failure to comply with rule 955(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131; rule 9.20(d) (formerly rule 955(d).) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 955. (*Bercovich v. State Bar, supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar, supra*, 45 Cal.3d at p. 1188; *Powers v. State Bar, supra*, 44 Cal.3d at p. 342.)

Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although she has been given the opportunity to do so. She did not participate in this proceeding and did not comply with rule 955(c). More importantly, respondent's noncompliance with rule 955 undermines its prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar, supra*, 45 Cal.3d at p. 1187.)

Respondent's disbarment is necessary to protect the public, the courts and the legal community, to maintain high professional standards and to preserve public confidence in the legal profession. It would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for his unexplained wilful disobedience of the Supreme Court 's order.

VII. DISCIPLINE RECOMMENDATION

It is hereby recommended that respondent CHERYL ANN PODBIELSKI be disbarred from the practice of law in the State of California and that her name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule

9.20(a) of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in rule 9.20(c) within 40 days of the effective date of the order showing her compliance with said order.

VIII. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

IX. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: May ___, 2007

RICHARD A. HONN
Judge of the State Bar Court